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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RUBEN HERNANDEZ, Defendant and Appellant.	E061797 (Super.Ct.No. FVA012893) OPINION

APPEAL from the Superior Court of San Bernardino County. Gerard S. Brown, Judge. Affirmed.

The Hostetler Firm and H. Stephen Hostetler for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Barry Carlton and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant appeals from the trial court's order denying his motion under Penal Code section 1016.5[1] to vacate his conviction and withdraw his guilty plea from 14 years earlier. In the alternative, he argues there was no factual basis for the plea. As discussed below, defendant has not established that the trial court abused its discretion when it denied his motion. We will not consider defendant's appeal regarding the factual basis for the plea in 2000 because defendant was required to have appealed from the judgment of conviction within 60 days.

I. FACTS AND PROCEDURE

On February 10, 2000, defendant and his wife brought their five-month-old daughter to a hospital emergency room. Medical personnel suspected child abuse because of the extensive bruising on the child's torso, abrasions to the head, and other factors. When interviewed by law enforcement, defendant initially stated the child had fallen off a bed when defendant left the room to answer the telephone. Eventually, defendant admitted that he had become frustrated with the crying child, and so picked her up and shook her forcefully, and may have held her very tight while doing so. It was eventually discovered that the child had multiple lacerations to her liver that had placed her life in danger, along with a fractured rib.

On February 16, 2000, the People filed a felony complaint charging defendant with corporal injury to a child (§ 273d, subd. (a)) and child abuse (§ 273a, subd. (a)).

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[1] All section references are to the Penal Code unless otherwise indicated.

The People alleged as to both counts that defendant personally inflicted great bodily injury. (§ 12022.7, subd. (a).)

On April 17, 2000, defendant pled guilty to corporal injury to a child in exchange for a two-year prison sentence. The trial court sentenced defendant on June 22, 2000.

At the time of defendant's arrest, he was undocumented. However, defendant states he had been approved for permanent resident status because his father was a United States citizen, and he had been scheduled for a final interview to pick up his permanent resident card in July 2000.

Defendant was released from prison in September 2001 and "almost immediately" deported to Mexico.

In October 2001, defendant returned to the United States, but was stopped by Immigration and Customs Enforcement, charged with illegal entry, and sentenced to one year in prison.

In September 2002, defendant was released from prison and again removed to Mexico.

In June 2005, defendant returned to the United States, where he lived and worked until he was arrested on June 5, 2013, charged with illegal entry, and incarcerated pending trial. On August 25, 2014, defendant pled guilty to unlawful entry and, on November 17, 2014, was sentenced to 21 months in federal prison, with credit for 17 months of time served.

On May 12, 2014, defendant filed a motion to vacate his conviction and allow him to withdraw his guilty plea pursuant to Penal Code section 1016.5. Attached to the motion were defendant's declaration, numerous letters of reference, and the declaration of defendant's current counsel stating that a record transcript of the April 17, 2000, plea hearing was unavailable because the court reporter's notes had been destroyed pursuant to Government Code section 69955.

The trial court held a hearing on the motion on June 20, 2014. After hearing argument from counsel, the court denied defendant's motion. The court reasoned: defendant signed the plea form stating he had been warned about the immigration consequences of his plea; defendant spoke English well enough to participate in a police interview in February 2000 and to graduate from high school in Fontana; the petition was untimely because defendant was deported in 2001 and 2002 based on the conviction, and defendant again entered the United States in 2005 without challenging the plea under Penal Code section 1016.5; and the untimeliness of the motion caused the record transcript of the plea to be unavailable, as the court reporter's notes were destroyed after 10 years pursuant to Government Code section 69955.

This appeal followed.

II. DISCUSSION

A. *Immigration Consequences*

Defendant argues the trial court erred when it determined that he had not established that he was not adequately advised of the immigration consequences of his guilty plea in 2000.

Under section 1016.5, a defendant can obtain relief if he or she "demonstrate[s] that (1) the court taking the plea failed to advise the defendant of the immigration consequences as provided by section 1016.5, (2) as a consequence of conviction, the defendant actually faces one or more of the statutorily specified immigration consequences, and (3) the defendant was prejudiced by the court's failure to provide complete advisements." (*People v. Chien* (2008) 159 Cal.App.4th 1283, 1287, citing *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 199-200; *People v. Totari* (2002) 28 Cal.4th 876, 884.) As discussed below, we agree with the trial court that defendant has not met his burden to demonstrate that the original trial court failed to comply with section 1016.5.

Section 1016.5, subdivision (a), requires the following admonishment be given to any defendant entering a guilty plea: "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

The court is not necessarily required to provide the above warning orally. However, it must appear on the record, and it must be given by the court. (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 175; *People v. Ramirez* (1999) 71 Cal.App.4th 519, 521-522; cf. *People v. Panizzon* (1996) 13 Cal.4th 68, 83 [trial court "may rely upon a defendant's validly executed waiver form as a proper substitute for a personal admonishment" with respect to losing right to appeal a sentence after pleading no contest].)

"[T]he legislative purpose of section 1016.5 is to ensure a defendant is advised of the immigration consequences of his plea and given an opportunity to consider them. So long as the advisements are given, the language of the advisements appears in the record for appellate consideration of their adequacy, and the trial court satisfies itself that the defendant understood the advisements and had an opportunity to discuss the consequences with counsel, the legislative purpose of section 1016.5 is met. [Citation.]" (*People v. Ramirez, supra*, 71 Cal.App.4th at p. 522.) "Nor need the statutory admonition be given orally. It is sufficient if, as here, the advice is recited in a plea form and the defendant and his counsel are questioned concerning that form to ensure that defendant actually reads and understands it." (*People v. Quesada* (1991) 230 Cal.App.3d 525, 536, superseded by statute on another point as stated in *People v. Totari* (2003) 111 Cal.App.4th 1202, 1207.)

A trial court's ruling on a section 1016.5 motion will withstand appellate review unless the record shows a clear abuse of discretion. (*People v. Superior Court*

(*Zamudio*), *supra*, 23 Cal.4th at p. 192.) In properly applying the standard of review, an appellate court must uphold the trial court's reasonable inferences and resolution of factual conflicts if supported by substantial evidence, viewed in the light most favorable to the ruling, and must also accept the court's credibility determinations. (*People v. Quesada*, *supra*, 230 Cal.App.3d at p. 533.) The trial court's inferences and conclusions here are supported by substantial evidence.

Here, the warning required by section 1016.5 is included in acknowledgment No. 14 of the plea form, which defendant initialed. In addition, defendant's trial counsel signed the attorney statement providing that he "personally read and explained the contents of the above declaration to the defendant . . . ." Finally, although we lack the record transcript of the plea hearing, and the minute order of that day does not report that the court re-advised defendant of the immigration consequences specifically, the minute order does state that: "The Court, after readvisement of each of these rights, finds that the Defendant understands the charge(s), the possible penalties . . . ." The trial court considered these facts when it concluded that defendant was properly advised, and in fact specifically cited to *People v. Ramirez*, *supra*, 71 Cal.App.4th 519 for its conclusion that "the warning need not be oral; signing of waiver form is held sufficient."

The trial court's exercise of discretion is also supported by the following substantial evidence that defendant did indeed understand English well enough to understand the immigration warning. First, defendant initialed the box next to acknowledgment No. 21, which states: "I can read and understand English." Second, the

court noted that the police report from the child abuse case "makes it crystal clear that he spoke English just fine. And I want to go to my notes here on that. The detective interviewed the defendant who understood and spoke fluent English." This conclusion is supported by the police report, in which the interviewing detective states: "I determined that [defendant] has lived in the United States for approx. 14 years and has attended school in the Fontana area where he was taught in the English language. I determined that he both understands and speaks the English language fluently." The court was entitled to believe this evidence over the contrary statements contained in defendant's declaration.

We cannot conclude from this record that the trial court abused its discretion when it denied defendant's motion to vacate, or that it based its ruling on less than substantial evidence. Absent a record transcript of the plea hearing, we must rely on the face of the plea agreement, along with any other evidence in the record, such as the minute order. Although the minute order is less than completely conclusive that the court specifically inquired of defendant regarding the immigration consequences warning, the plea form strongly indicates defendant was so advised, and defendant points to nothing in the record, other than his own declaration, that suggests otherwise.

B. *Factual Basis for Plea*

In the alternative, defendant argues there was not a sufficient factual basis for his plea, based on the trial court's failure to check box No. 6 in the "Order" section at the very end of the plea agreement, which directs the court to "[r]ead these findings orally

into the record." By checking box No. 6, the court affirms that "[a]fter directly examining the defendant, the court finds: [¶] . . . [¶] . . . That a factual basis exists for the plea(s) of guilty [and admission(s)], and/or that the plea bargain is hereby approved."

We cannot consider this issue because the notice of appeal filed in this case, as well as defendant's request for a certificate of probable cause, were not filed within 60 days of the judgment of conviction in 2000. (Cal. Rules of Court, rule 8.308(a); *People v. Mendez* (1999) 19 Cal.4th 1084, 1095.)

III. DISPOSITION

The trial court's order denying defendant's motion to vacate his conviction and withdraw his plea is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.